

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 4196 OF 2007

IN

SUIT NO. 3067 OF 2007

Aviation Resource Group
International Ltd.

... Plaintiff.

V/s.

Mumbai International Airport
Pvt. Ltd.

... Defendant.

Mr. Dinyar Madon, Senior Advocate with Ms. Soumya
Srikrishna and Darshan R. Mehta and Bharti Badesara
i/b. M/s. Dhruve Liladhar & Co. for the Plaintiff.
Mr. Virag Tulzapurkar, Senior Advocate with Mr. P.S.
Samdhani, Senior Advocate and Farida Karachiwala
Abhijeet Marathe i/b. Wadia Ghandy & Co. for the
Defendant.

CORAM : DR. D.Y. CHANDRACHUD,J.

04TH DECEMBER 2007.

P.C. :-

. With the consent of Counsel appearing on behalf
of the Plaintiff and the Defendant, the Notice of
Motion has been taken up on Board for hearing and final
disposal. The Defendant has been permitted to proceed
on the basis of denials. The gist of the relief which
the Plaintiff has sought in the Notice of Motion is
thus :-

(a) That pending the hearing and final disposal of the suit, the Defendant be restrained by an injunction from entering into an agreement with a third party covering the subject matter of the Memorandum of Understanding dated 18th April 2007 between the parties to the suit;

(b) That pending the hearing and final disposal of the suit, the Defendant be enjoined from preventing the Plaintiff from carrying on the work of the project covered by the aforesaid M.O.U.

2. The dispute arises out of a Memorandum of Understanding that was entered into between the parties on 18th April 2007. The M.O.U. provides for a 'Fixed Base Operation for the phased development of the General Aviation Executive Terminal and related hanger and commercial office facilities at Chhatrapati Shivaji International Airport, Mumbai'. The M.O.U. contemplates that parties intended to enter into a Joint Venture Agreement or a Concession Agreement. The development of a Fixed Base Operation was to take place in two phases, viz. Phase I and Phase II. The work in

Phase I was to be executed in an estimated period of three years. Pending the constitution of a Joint Venture or the execution of a Concession Agreement, the Defendant agreed to permit the Plaintiff to commence the execution of work in Phase I. Parties however agreed to negotiate in good faith for the execution of a Joint Venture Agreement or a Concession Agreement within 60 days of the M.O.U. The M.O.U. sought to establish what parties themselves called an **"initial understanding"**. The two phases for the work of development of a Fixed Base Operation at the International Airport were as follows :-

Phase I : Interim Private and General
Aviation Executive Terminal.

Phase II : Private and General Aviation
Executive Terminal Expansion.

3. The work of development under Phase I was to be concluded either within three years from the date of the execution of the M.O.U. or the execution of the agreement in respect of Phase II whichever was earlier. Parties contemplated the payment of **interim**

compensation to the Plaintiff for the work of Phase I prior to the constitution of a Joint Venture or, as the case may be, the execution of the Concession agreement. The interim compensation was to be 15% of the monthly gross revenue.

4. By a communication dated 2nd July 2007, the Defendant informed the Plaintiff that the M.O.U. contemplate the execution of either a Joint Venture Agreement or a Concession Agreement within 60 days of the execution of the M.O.U. and since no documents have been agreed upon, the M.O.U. has ceased to have effect. The Defendant stated that it would take steps to stop the on going work which was being carried out by the Plaintiff and expressed a willingness to determine the value of the work done.

5. The Plaintiff seeks specific performance of the M.O.U. dated 18th April 2007 and a declaration that the notice issued by the Defendant is not binding or effective. There is, in the suit a monetary claim made by the Plaintiff in the amount of Rs.2.12 crores and Rs.1.58 crores towards expenses due to the stoppage of work (Exhibits HH and II) and a claim for damages in

the amount of Rs.95.45 crores. According to the Plaintiff, it had acting upon the M.O.U. commenced the work of developing Phase I. The work of Phase I that has been carried out by the Plaintiff has been particularized in paragraph 20 of the plaint.

6. Counsel appearing on behalf of the Plaintiff has submitted that a binding agreement was entered into between the parties in the form of an M.O.U. on 18th April 2007. Though parties contemplated that they would negotiate upon entering into a Joint Venture or, as the case may be, a Concession, there was according to the submission, a concluded agreement in so far as Phase I was concerned. Acting on the agreement it is submitted that the Plaintiff carried out work approximately of Rs.3 crores. The submission urged is that the basis on which the Defendant treated the M.O.U. as having ceased to have effect is erroneous because the terms of the M.O.U. do not stipulate that it would cease to be in operation if the final agreement was not negotiated within a period of 60 days.

7. On behalf of the Defendant, the relief that has been sought by the Plaintiff in the Motion has been opposed on the basis that : (i) There is no concluded contract between the parties and the M.O.U. only reflected an agreement between the parties to arrive at a final agreement; (ii) The grant of specific relief in a case such as the present would be impermissible due to the provisions of clauses a,b and c of sub-Section 1 of Section 14 of the Specific Relief Act, 1963 ; and (iii) This is a case where the hardship that will be occasioned by the grant of an injunction falls within the exception where no specific performance should be ordered.

8. In considering prima facie the merit of the submissions which have been urged on behalf of the parties at this stage, a brief reference to the M.O.U. would be in order. The M.O.U. contains at the outset the following statement :-

" Further to our meetings on Monday the 26th of February, 12th of March, 17th of March, 31st of March and conference call of 5th of April, **this MOU confirms the intent of MIAL and ARGI to enter**

into a Joint Venture Agreement ("JVA") or a concession Agreement (if MIAL decides that a Concession Agreement is more suitable) for the development of a Fixed Base Operation (FBO) for the phased development of the General Aviation ("GA") Executive Terminal and related hangar and commercial office facilities at Chhatrapati Shivaji International Airport ("BOM" or "the Airport")." (emphasis supplied)

9. This part of the M.O.U. therefore prima-facie shows that the intent of the parties was to enter into a Joint Venture Agreement or a Concession Agreement in future. The M.O.U. provided an understanding for the development of the Fixed Base Operation which was to take place in two Phases, Phase I being for an estimated period of three years and Phase II which was subject to the condition that sufficient airport property is made available to extend the interim facilities into expanded facilities. The M.O.U. stipulates that pending the constitution of the Joint Venture or execution of the Concession Agreement, the Plaintiff was being permitted to commence the execution of Phase I work at the airport. Parties contemplated

that they would negotiate in good faith so as to arrive at the specific terms that would govern the Joint Venture or as the case may be, a Concession agreement.

10. One section of the M.O.U. stipulates its Objectives. The objectives are to establish an **initial understanding** between the Plaintiff and the Defendant for a two Phase development of the International Airport. The M.O.U. prescribes the contents of Phases I and II. Initially, the Plaintiff was to be responsible for the operation and management of the facility. Upon the execution of a Joint Venture Agreement, the Joint Venture was to provide for operation. If a Concession Agreement was entered into the Plaintiff would remain responsible for the operational facility. As noted earlier, the work under Phase I was to begin upon the execution of the M.O.U. and to conclude either three years from the date of the execution of the M.O.U. or the execution of an agreement in respect of Phase II which was earlier. The M.O.U. provides for the payment of interim compensation for Phase I, the compensation being at the rate of 15% of the monthly gross revenue. The interim compensation was to be operative till the Joint Venture

Agreement or a Concession Agreement were entered into.

11. These provisions in the M.O.U. **prima-facie** show that the intent of the parties was that the initial understanding would be followed by negotiations upon which their reciprocal obligations and rights would be crystalised either into a Joint Venture or a Concession Agreement. The M.O.U. was to establish an initial understanding for a two phase development of the International Airport. Pending the constitution of a Joint Venture or the execution of a Concession Agreement, the Plaintiff was permitted to commence work in Phase I and parties agreed to the payment of interim compensation until a final agreement was concluded.

12. The settled principle of law is that the mere circumstance, that parties intend to enter into a formal contract in the future is not by itself indicative of the fact that parties do not intend to be bound until a formal contract is signed. There may, however, be cases where a reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. **(Koilipara Sriramulu (dead) by his**

legal representative V/s. T. Aswatha Narayana (dead)

by his legal representative A.I.R. 1968 S.C. 1028.)

13. Prima facie, in the present case, parties intended that the terms and conditions on which the development of a Fixed Base Operation facility would take place and be operated would be covered by a Joint Venture or, as the case may be, a Concession Agreement which was still to be negotiated. The section of the agreement which is entitled as the 'Overview' would show that both Phase I as well as Phase II were to be covered eventually by the terms of a Joint Venture or Concession Agreement. At this stage, it cannot be stated that there was no understanding between the parties whatsoever because prima-facie the M.O.U. would show that there was an understanding that pending the execution of a final agreement, the Plaintiff was permitted to carry out the work of Phase I. The fact, however, remains that the M.O.U. was intended to be an initial understanding between the parties which was to be replaced by a negotiated agreement defining the mutual rights and obligations under the Joint Venture Agreement. The Plaintiff in its letter dated 24th July 2007 has spoken of "the transition from our original

M.O.U. dated 18th April 2007 to a new Agreement in which the Defendant and Plaintiff would combine efforts to complete the construction, set-up and operation of the FBO facilities for Aviation users of Mumbai Airport." The letter of the Plaintiff would show that besides issues relating to construction which had to be resolved, there were other areas which had yet to be negotiated. Those areas are detailed in the letter of the Plaintiff as follows :-

'Discuss the application of the paid-in investment by ARG1 in the GA Terminal construction to date, as the basis for establishing shareholding in the new joint company which will operate and manage the FBO services;

Develop and agree to shareholding agreement between MIAL and ARG1;

Finalizing the interior design of the GA Terminal Building;

Selection of Furniture, Fixtures and Equipment

(FF& E);

Selection and ownership of Ground Handling Equipment;

Selection and hiring of a General Manager;

Selection, hiring and training of FBO Operational personnel."

14. There is prima facie merit in the contention which has been urged on behalf of the Defendant that an understanding of the nature involved cannot be the subject of a decree for specific performance. Section 14 of the Specific Relief Act, 1963 provides that certain contracts cannot be specifically enforced. Among them, in clause (a) is a contract for the non-performance of which compensation in money is an adequate relief. Clause (b) speaks of a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms. Clause (d) deals with a contract

the performance of which involves the performance of a continuous duty which the Court cannot supervise. Prima-facie, the facts of the present case would fall within the purview of clauses (a), (b) and (d) of sub-Section 1 of Section 14. The Plaintiff has made a monetary claim, comprising inter alia of a claim for damages in the amount of Rs.95.45 crores. The M.O.U. between the parties would prima-facie show that an understanding of this nature would run into minute or numerous details and is dependent on the personal qualifications of the parties themselves. The performance of the M.O.U. would involve a continuous duty which cannot be supervised by the Court. The mutual rights and obligations of the parties would cover besides issues which arise of the course of construction, a wide range of obligations and entitlements arising out of a commercial relationship. Some of those have already been adverted to above in the context of the Plaintiff's letter dated 24th July 2007. Finally, it would be necessary to observe that the relief that has been sought in the motion is for an order restraining the Defendant from entering into any agreement with a third party covering the subject matter of the M.O.U. and from preventing the Plaintiff

for carrying out work. The circumstance that the facility has to be constructed at the International Airport to subserve the interests of passengers using the facility cannot be lost sight of by the Court. The grant of injunctive relief would be a matter of serious hardship which is one additional circumstance that will militate against the grant of interlocutory relief.

15. For all these reasons, I am of the view that the relief that has been sought in the Notice of Motion cannot be granted. The Notice of Motion is accordingly dismissed.
